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Supreme Court, U.S.
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No. 94-1113

IN THE

SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1994

KATHERINE HODGES,
Petitioner,

v.

GREG HUNTSMAN,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS FOR THE FIFTH CIRCUIT APPLIED THE PROPER STANDARD OF REVIEW ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT UNDER RULE 56 AND THE DECISIONS OF THIS COURT CONSTRUING THAT RULE?

PARTIES TO THE PROCEEDING

The Petition correctly states the parties to this proceeding, i.e. the Petitioner is Katherine Hodges, current employee of the City of Houston and the plaintiff below, and the only Respondent is Greg Huntsman, also a current employee of the City of Houston and a defendant below. The other defendants below, E.J. Stringfellow, R.D. Lynn, Jr., and the City of Houston are not part of the present Petition.

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STATEMENT OF THE CASE

While Petitioner's statement of the facts of the case (Petition at 2-6) is basically accurate, it contains several significant errors or omissions. First of all, Hodges states that the individual defendants "claimed qualified immunity and moved for summary judgment or, in the alternative, dismissal under Rule 12 (b) (6)." (Petition at 3) This is incorrect. An examination of Defendants' motion shows that the portion asserting immunity is styled "MOTION FOR SUMMARY JUDGMENT OR DISMISSAL UNDER THE

QUALIFIED IMMUNITY DEFENSE." (Petition at 17a) No reference is found to Rule 12 (b) (6). Instead, the Motion states that the Defendants "are entitled to assert *the affirmative* defense of qualified immunity in a civil rights action." (Petition at 18a; emphasis added) It is elementary that a defendant cannot assert an affirmative defense by a Motion under Rule 12 (b) (6). The nature of Defendants' assertion of the affirmative defense of immunity is made more apparent by comparing it to the last portion of Defendants' motion which is entitled "MOTION TO DISMISS" and which attacks the adequacy of Plaintiff's pleadings on certain claims in the manner of a Rule 12 (b) (6) motion. (Petition at 22a-29a)

Second, Hodges incorrectly states that Defendants' "motion mentions Huntsman's name only twice." (Petition at 5) She goes on to specify that Huntsman is only mentioned in the beginning of the motion and in the prayer, asserting "Huntsman's motion pleads no more." (*Id.*) This is clearly in error. In the beginning of the portion of the motion on immunity is this assertion: "Defendants Stringfellow, Lynn, and *Huntsman* move for dismissal from Plaintiff's claims in their individual capacities on the theory that they enjoy qualified immunity from suit." (Petition at 17a-18a; emphasis added.)

Third, Hodges asserts: "The entire motion of all three defendants contains no attachments excepting the three exhibits for the period of June 1990 discussed above." (Petition at 5-6) While this is correct, Hodges fails to mention that the same is true of her response to the motion, *i.e.*, no affidavits or other documents are attached which relate to her claims against Huntsman. (See "PLAINTIFF KATHERINE HODGES' RESPONSE AND OPPOSITION

TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR DISMISSAL" in (Record at 78-42) As the Court of Appeals noted: "Hodges has rested on her pleadings, an insubstantial form of evidentiary material with which to oppose a summary judgment motion." (Petition at 7a)

Finally, Hodges declares: "There is nothing in Huntsman's motion, attachments or Court record that converts his Rule 12 (b) motion into a Rule 56 motion." (Petition at 6) This is sheer sophistry! As already noted, this was not a Rule 12 (b) motion in the first place. Further, an assertion of qualified immunity generally, by its very nature, cannot be resolved on the pleadings alone, *i.e.*, whether or not the constitutional right was clearly established at the time of the alleged violation cannot depend on whether or not the plaintiff has plead that it was. Therefore, the "right" that is postulated that would allow Hodges to "rest on her pleadings under Rule 12 (b) (6)" is not applicable when the issue is the availability of qualified immunity. (Petition at 8)

REASONS FOR DENYING THE WRIT

This case is not one meriting review by this Honorable Court. Petitioner has not established any of the considerations set forth in this Court's Rule 10. The decision rendered by the Court of Appeals is not in conflict with any other decision of another Court of Appeals or of this Court. Although Petitioner has cited a number of opinions by Courts of Appeals (Petition at 6, 8), they are readily distinguishable from the present case because they involved a motion under Rule 12 (b) (6) or because they do not involve an issue of qualified immunity. This case presents no important legal issue that this Court has not decided but should decide. This

actions of the lower court were not of such a nature as to call for an exercise of this Court's power of supervision.

ARGUMENT

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT UNDER RULE 56 AND THE DECISIONS OF THIS COURT CONSTRUING THAT RULE.

Hodges offers no authority supporting her implicit and somewhat novel legal proposition that the issue of qualified immunity can only be raised by a motion under Rule 12 (b) (6). A motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12 (b) (6) focuses only on the plaintiff's pleading and must accept as true all the facts that are plead. It is a descendent of the demurrer in the old common law. *Conley v. Gipson*, 355 U.S. 41, 45-46 (1957). However, there is no requirement that the plaintiff even mention the subject of immunity in the complaint, much less negate its existence, in order to state a cause of action. Instead, immunity is an affirmative defense that must be raised in the defendant's answer. *Gomez v. Toledo*, 446 U.S. 635 (1980). Therefore, the issue of qualified immunity is singularly unsuited for determination by a Rule 12 (b) (6) motion because the court's review is limited to the plaintiff's pleadings with all the factual averments being deemed as true. In the case at bar, Hodges specifically plead that the individual defendants were not shielded by qualified immunity. (See Plaintiff's First Amended Original Complaint at ¶34 in Record at 6) Simply taking that allegation as true would therefore doom any Rule 12 (b) (6) motion based on qualified immunity.

Hodges also cites no authority even remotely suggesting that immunity cannot be resolved on a motion for summary judgment under Rule 56. As this Court has recognized, the issue of qualified immunity is singularly suited for determination by summary judgment procedure, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and this Court has recognized the availability of an interlocutory appeal from the denial of summary judgment, *Mitchell v. Forsyth*, 472 U.S. 511 (1985). As the Court wrote:

> *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell v. Forsyth, *supra*, at 526. (Emphasis in original.).

This Court has made clear that the very nature of immunity makes it most suitable for early resolution by summary judgment. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991), citing *Harlow*, *supra*. Moreover, in *Hunter*, the Court reversed the court of appeals in part because the latter had concluded that immunity was a question of fact for the jury and that summary judgment was not appropriate unless there was only one reasonable conclusion a jury could reach. This Court rejected such approach because "it routinely places the question of immunity in the hands of a jury. Immunity

ordinarily should be decided by the court long before trial." *Id.* at 228.

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court has developed an expeditious manner for resolving claims lacking merit under Rule 56. Hodges argues that the Court of Appeals was without "any justification" for using the standard for Rule 56 set out in *Celotex*. (Petition at 7) She implies that because Defendants' motion contained no exhibits or affidavits, it could not be a Rule 56 motion. (Petition at 6-7) However, in *Celotex*, *supra*, a majority of the Court of Appeals had adopted a position not unlike that urged here by Hodges. It concluded that the Celotex Corporation's motion was "fatally defective" because it "made no effort to adduce *any* evidence in the form of affidavits or otherwise to support its motion." *Celotex*, *supra*, at 321. In response, this Court observed that

> unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or similar materials *negating* the opponent's claim. On the contrary, Rule 56 (c), which refers to "the affidavits, *if any*" (emphasis added) suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56 (c) in this regard, such doubt is clearly removed by Rules 56 (a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "*with or without supporting affidavits*" (emphasis added). The

> import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for summary judgment as set forth in Rule 56 (c), is satisfied.

Id. at 323. (Emphasis in original.)

Later, this Court interpreted its holding thus: "*Celotex* made clear that Rule 56 does not require the moving party to *negate* the elements of the non-moving party's case . . . ." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 885 (1990).

Therefore, Hodges's contention that Defendants' motion could not be a Rule 56 motion has already been soundly rejected by this Court and is clearly frivolous. It should be noted that Hodges's Petition is limited to her contention that the Court of Appeals "reviewed the appeal under Rule 56(c) when it should have reviewed the appeal under Rule 12 (b) (6)." (Petition at i) She apparently concedes the Court of Appeals correctly applied Rule 56 if it were applicable to the appeal. (Petition at 7-8)

CONCLUSION

This case presents no significant legal issue. The court below correctly applied this Honorable Court's teachings in *Celotex* on summary judgment. Petitioner offers no unique question of law for review, but rather merely muddles the issue by insisting that Rule 12 (b) (6) is somehow applicable

to the lower court's ruling. From the foregoing argument, it is clear that Petitioner's contention is wrong.

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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